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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

IRWIN UNION BANK AND TRUST  
COMPANY and IRWIN HOME EQUITY  
CORPORATION,

Plaintiffs,

vs.

FREEDOM MORTGAGE CORPORATION,

Defendant.

No.: C 08-00472 PJH

Action Filed: January 22, 2008

**REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION OF  
DEFENDANT FREEDOM  
MORTGAGE CORPORATION TO  
DISMISS OR STAY ACTION AND  
FOR AN ORDER COMPELLING  
ARBITRATION**  
[FRCP RULE 12(b)]  
[9 U.S.C. §§ 3-4]

Date: April 30, 2008

Time: 9:00 a.m.

Courtroom: 3

Judge: Phyllis J. Hamilton

<sup>1</sup> Admitted *pro hac vice*.

1 Defendant Freedom Mortgage Corporation ("Freedom") submits this reply in support of  
 2 Freedom's motion for an order dismissing this action (or, in the alternative, staying it pending the  
 3 completion of arbitration), and compelling plaintiffs Irwin Union Bank and Trust Company and  
 4 Irwin Home Equity Corporation (the "Irwin Entities") to arbitrate all causes of action alleged in  
 5 their Complaint against Freedom.

### 6 **STATEMENT OF ISSUES TO BE DECIDED**

7 This motion presents two issues to be decided by the Court:

8 (1) whether this action should be dismissed with prejudice or, in the alternative, stayed  
 9 pending the completion of binding arbitration; and

10 (2) whether the Irwin Entities should be compelled to arbitrate all causes of action alleged  
 11 in their Complaint against Freedom.

### 12 **STATEMENT OF RELEVANT FACTS**

13 The relevant facts for purposes of this reply brief are the same as those set forth in  
 14 Freedom's opening brief.

### 15 **ARGUMENT**

16 The U.S. Supreme Court has cautioned Courts against becoming entangled in the merits of  
 17 a dispute under the guise of determining arbitrability. *United Steelworkers of Amer. v. Amer. Mfg.*  
 18 *Co.*, 363 U.S. 564, 567-578, 80 S.Ct. 1343 (U.S. 1960); accord, *United Food and Commercial*  
 19 *Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9<sup>th</sup> Cir. 1994). The Irwin  
 20 Entities do not contend that this dispute is outside the scope of the arbitration clause. However,  
 21 they confuse the matter by raising issues that are not before this Court, but are properly for  
 22 resolution by the arbitrators to be appointed by the National Arbitration Forum. They also muddle  
 23 things by raising issues pending before the U.S. District Court, District of Delaware in an entirely  
 24 separate lawsuit involving an entirely different contract to which the Irwin Entities are not parties.

25 Where, as here, a party seeks to enforce an arbitration provision in a commercial contract  
 26 pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the Court's role is limited to determining

(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9<sup>th</sup> Cir. 2000). If the response is affirmative on both counts, then “the Act requires the court to enforce the arbitration agreement in accordance with its terms.” *Id.* By its terms, the FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Id.*, quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

The Irwin Entities concede that they are parties to the IHE Agreement, and that Freedom, as assignee, is also a party. The Irwin Entities also concede that the IHE Agreement contains a broad arbitration provision covering all claims “that arise[] out of or [are] related to this Agreement” (Opp. Br., p. 4). In their seven-page opposition, the Irwin Entities never dispute that their claims, which concern alleged rights under the IHE Agreement, are encompassed by the arbitration provision. As a result, the FAA mandates arbitration.

Courts have squarely rejected the Irwin Entities’ suggestion that arbitration is not required based on the use of the word “may” in the arbitration clause, *United Steelworkers of Amer. v. Amer. Mfg. Co.*, *supra*, 363 U.S. at 565; *Erickson v. Aetna Health Plans of California*, 71 Cal. App. 4<sup>th</sup> 646, 654-655 (1999); *Service Employees Internat. Union, Local 18 v. Amer. Building Maint. Co.*, 29 Cal.App.3d 356, 358 (1972). Indeed, even the Irwin Entities recognize that “contract provisions containing permissive language such as the term ‘may’ *can* serve as the basis to compel arbitration”, (Opp. Br. at 4:16-17). They even cite to cases so holding in their opposition. *United States v. Bankers Ins. Co.*, 245 F.3d 315, 318-321 (4<sup>th</sup> Cir. 2001) (Opp. Br. at 4:18-19)(reversing trial court’s denial of a motion to stay pending arbitration).

Contrary to the Irwin Entities’ assertions, even if the interest of judicial economy was an appropriate consideration (and it is not), that interest would be furthered not by keeping this case in this Court, but by the Court dismissing this action and compelling arbitration, as agreed by the

parties in the IHE Agreement. None of the cases cited in the opposition suggest otherwise; indeed, none of them involve a situation, like here, where parties to an arbitration agreement seek to merge their dispute with a lawsuit involving different parties in a completely different forum. But more to the point, given the scope of the arbitration agreement and the substance of the claims, the law provides this Court with no other choice.<sup>2</sup>

### CONCLUSION

For the reasons set forth herein and in its moving papers, Freedom respectfully requests that the Court issue an order dismissing this action (or in the alternative, staying it in its entirety) and compelling the Irwin Entities to arbitrate all causes of action averred in the Complaint.

Dated: April 16, 2008

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By: 

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FREEDOM MORTGAGE CORPORATION

<sup>2</sup> Moreover, the arbitration clause requires any litigation between the parties to the IHE Agreement to proceed in Contra Costa County. Freedom reserves any right to object on the basis that the San Francisco Division has no jurisdiction because it is not located in Contra Costa County.